



## RAVALLI COUNTY ATTORNEY


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### MEMO

**TO:** Regina Plettenberg  
Ravalli County Clerk & Recorder

**CC:** Ravalli County Commissioners  
Legal Counsel, OPI

**FROM:** George Corn 

**DATE:** January 28, 2008

**RE:** Florence Fire District

RECEIVED

JAN 28 2008

Ravalli County Commissioners

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Dear Regina:

On January 7, 2008, I received your request for an opinion on the issue of whether Kevin O'Brien and Jim Shreve may serve on both the Florence School District Board and Florence Rural Fire District Board of Trustees. I have reviewed the copy of the letter of complaint submitted to John McGee at the Florence-Carlton School, and have additionally received a copy of a letter from the Commissioner of Political Practices stating that this issue is not within the jurisdiction of his office. My office also spoke briefly with legal counsel at OPI, who deferred this decision to the local elections authority (*i.e.* you), and the County Attorney's Office.

In speaking with you and Julie Mason at the Florence school, it is my understanding that Mr. O'Brien was originally elected to the Fire District Board in 2005 and elected to the School District Board in a separate election in May of 2006. Mr. Shreve was first elected to the Fire District in 2004 and elected to the School District Board in a separate election in May of 2007. Both Mr. O'Brien and Mr. Shreve currently sit on both boards.

The issues raised against these individuals are 1) that they have violated §13-10-201 by filing for more than one public office; 2) that there is a conflict between the two boards because the School District owns the property the Fire Department sits on; and 3) there could be a future conflict if both districts wish to simultaneously seek mill levies to obtain additional funding for the districts.

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In regard to the first issue, I have attached a copy of my February 6, 2006, memo to you regarding the number of filings allowed for public offices. As that memo explains, §13-10-201(1), MCA, states "A candidate may not file for more than one public office." Per the legislative history, this sentence was inserted into the statute in 2003 to provide that a person could not run for two offices at once. Based upon the information that I have been provided, it does not appear that either Mr. O'Brien or Mr. Shreve filed for more than one public office in any given election, thus, this statute has not been violated.

The second issue involves whether there is a conflict of interest in holding positions on both of these boards simultaneously. My February 6, 2006 memo outlined some specific examples that have been addressed by the Attorney General, and stated that such issues must be determined on a fact-driven, case-by-case basis.

Montana law in general does not prohibit a person from running for a public office when they already sit on one public board. *See* 42 AG 94 (1988). In fact, the right of an elected officer to be a candidate for any public office is protected by the Montana Constitution. The case of Committee For An Effective Judiciary v. State (1984), 209 Mont. 105, 679 P.2d 1223 notes that Montana's general Constitutional scheme declares the rights of office holders in all branches of government to seek office while still holding office. Although there are specific constitutional exceptions for state legislators and judges, neither type of office is involved here. Thus, no violation of state law was committed when a member of the Fire District Board ran for office on the School District Board.

Once a person holds two offices, it must be determined whether those offices are compatible. The general legal rule in Montana is that two public offices may not be held concurrently by the same person if those offices are incompatible in nature. State ex rel. Klick v. Wittmer (1914), 50 Mont. 22, 144 P. 648. The Montana Supreme Court and Attorney General's Office have repeatedly held that public offices are "incompatible" when:

- 1) one office has power of removal over the other;
- 2) one is in any way subordinate to the other;
- 3) one has power of supervision over the other; or
- 4) the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both offices. Klick, 50 Mont. @ 24-25 (citations omitted).

The Montana Attorney General has determined that the office of county commissioner is incompatible with a high school trustee position because the commissioners have statutory supervisory duties over school trustees. 42 AG 94 (1988). Similarly, a county commissioner is supervisory over, and therefore incompatible with the local Office of Disaster and Emergency

Services. 46AG 26 (1996). A city council member is also supervisory over, and therefore incompatible with, the city director of public works. 47 AG 19 (1998). Finally, membership on the town council is incompatible with employment as a town fire fighter (2005 AG Letter of Advice). In these cases, it is clear that one position is subordinate to the other.

Conversely, the trustee of a volunteer fire department has been held not incompatible with board membership for a fire service area because they are separate governmental entities which neither owe their creation nor continued existence to each other. 43AG 47 (1989). The office of the State Auditor was held not incompatible with board membership on the Hail Board, despite the fact that the Auditor reviews the insurance rates set by the Hail Board. Mountain States Insurance v. State (1985), 218 Mont. 365, 708 P.2d 564. Thus, an important consideration is whether the offices are separate entities, even though they may occasionally have interaction with each other.

The duties of a school district trustee are set forth in §20-3-324, MCA. The duties which may interact with the fire district include establishing levies and disposing of real property in the district. There are no powers and duties for school district trustees that provide direct or indirect supervision over fire district trustees.

The duties of a rural fire district trustee are set forth in §7-33-2105, MCA. The duties which may interact with the school district include requesting special levies and entering into contracts for fire protection services. These duties do not include any supervisory powers of school board trustees.

Considering the four criteria set forth above, the first three elements do not apply. Thus, we must examine whether the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both positions. The purposes of analyzing incompatibility of office is to prevent offices and positions of public trust from accumulating in a single person, prevent individuals from deriving a pecuniary benefit by virtue of dual position-holding, avoid inherent conflicts between superior and inferior positions, and to generally ensure that public office holders discharge their duties with undivided loyalty. There is no indication from the information provided to me that dual trustee-ship in these two offices presents any of these dangers. In considering the rationale of the case law and Attorney General's opinions cited above, there is nothing that it renders the nature and duties of the offices incompatible for all purposes. Rather, the boards are separate governmental entities which neither owe their creation nor continued existence to each other, even if there is occasional interaction on specific issues.

In regard to the two specific issues of concern which have been brought to my attention, the fact that the Fire Department sits on School District land does not present a current conflict. I have reviewed the Quitclaim deed which transferred that property from the School District to the Florence Rural Fire District in February 1998. This Quitclaim deed passed title of this property to the Fire District "so

long as the property is used for Florence rural fire district purposes." Sitting on both boards does not allow any discretion to revoke this contract, short of a change in the nature of the use of the property. At this time, I believe this situation was presented as a hypothetical, as no one has informed me that there is interest in changing the use of this property.

The second issue in regard to requesting levies is more complex. I can envision a scenario in which one district may well want its levy on the ballot to the adverse interest of the other district, especially given the difficulties in presenting multiple levies to Ravalli County tax payers. However, this issue of multiple levies does not render the offices in general incompatible under the governing law. Rather, it is more appropriately analyzed as a conflict of interest issue under §2-2-121, MCA.

This statute sets out the rules of conduct for public officers and employees, which includes by definition any elected officer of a school or special district. The statute enumerates certain actions which create conflicts for those public officers. §2-2-121(2) (e) addresses a scenario where a board member may be called upon to perform an act which may directly and substantially affect the economic benefit of another undertaking in which they are engaged as a representative. If this occurs, § 2-2-131 provides mandatory disclosure requirements to address the conflict of interest. The public officer, prior to acting in a manner contrary to his duties, must disclose the nature of the interest he holds which creates the conflict. If a situation were to occur such as a vote on simultaneous levies for both boards, the conflicted board members would have the obligation to properly disclose prior to the board taking action on that matter and then abstain from the vote involving that particular issue.

Regina, the question you posed is a good example of why each individual situation must be evaluated on a case-by-case basis, keeping in mind the overall objectives of our laws. Citizens have a right to full and meaningful participation in their government, and Ravalli County certainly appreciates those individuals who run for and serve on volunteer districts and boards. This must be balanced against the right to have board members serve with undivided interests and legally disclosed conflicts prior to action.

It is my conclusion that the offices on the Florence School District Board and Florence Rural Fire District Board are not incompatible, provided any individual conflicts of interest are properly disclosed. Please call me if you have any additional questions.